

BRB No. 92-1931

CHARLEY ATHERTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED: _____
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ben H. Walley, Administrative Law Judge,
United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (88-LHC-3405) of Administrative Law Judge Ben H. Walley awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. In his initial decision in this case the administrative law judge granted claimant's motion for summary judgment and found that claimant, a retiree, should be compensated for his work-related hearing loss pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23), of the Act. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of \$750, to be paid by employer.

Employer appealed these decisions to the Board. Employer subsequently moved to remand the case to the administrative law judge for further action consistent with the decision of the United

States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), in which the court held that a retiree's hearing loss benefits are to be calculated pursuant to Section 8(c)(23). In an Order dated November 1, 1991, the Board granted the motion to remand. *Atherton v. Ingalls Shipbuilding, Inc.*, BRB No. 89-1072 (Nov. 1, 1991) (order). The Board further directed the administrative law judge to consider claimant's entitlement to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e). Lastly, the Board vacated the attorney's fee award and instructed the administrative law judge to reconsider the fee award in light of his decision on remand.

On remand, consistent with the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), the administrative law judge awarded claimant benefits pursuant to Section 8(c)(23) for a 52 percent binaural loss converted to an 18 percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The administrative law judge further found that employer is liable for a Section 14(e) penalty. The administrative law judge rejected employer's contentions that it is not liable for the penalty because it was "excused" from filing a notice of controversion by the district director, and because its Form LS-202, First Report of Injury, is the functional equivalent of a notice of controversion. The administrative law judge also reaffirmed the attorney's fee award to claimant's counsel.

Claimant appeals the administrative law judge's decision; in his brief he states that he wishes to preserve his right to seek an award pursuant to Section 8(c)(13) inasmuch as the United States Court of Appeals for the First Circuit in *Bath Iron Works Corp. v. Director, OWCP [Brown]*, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991) held that retirees' hearing loss awards are to be calculated pursuant to Section 8(c)(13), and the Supreme Court granted *certiorari* in *Brown* in order to resolve the split in authority between the First and Fifth Circuits. Employer has not responded to this appeal.

In *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), the United States Supreme Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13). Specifically, the Court stated that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." See 33 U.S.C. §910(i). Since Section 8(c)(23) only applies to retirees with such occupational diseases, it is inapplicable to hearing loss injuries.

Consequently, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Inasmuch as the administrative law judge's finding that claimant has a 52 percent binaural hearing loss is unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits for this hearing loss pursuant to Section 8(c)(13) of the Act.

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to benefits pursuant to Section 8(c)(13). In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge